

The Biggest Enviro Policy Moves Of 2022: Midyear Report

By **Juan Carlos Rodriguez**

Law360 (July 1, 2022, 2:59 PM EDT) -- The first half of 2022 has been filled with important environmental policy developments, from a groundbreaking climate change reporting rule for the financial industry to regulations that strengthen reviews for infrastructure projects that need federal approval.

Addressing climate change is atop the Biden administration's environmental agenda and to meet that goal, agencies proposed or finalized rules targeting vehicle greenhouse gas emissions and fuel efficiency as well as power plant emissions.

When it comes to water, the U.S. Environmental Protection Agency moved to restore authority to states and tribes that allows them greater control over proposed projects that could impact water quality within their jurisdictions.

There also have been key developments in the chemical and endangered species areas.

And environmental justice is at the forefront of policy decisions, at both the federal and state levels.

Here are some of the top environmental policy developments in the first half of 2022.

Financial Reporting

The U.S. Securities and Exchange Commission in March proposed new climate-related disclosure requirements on public companies. The rule would require companies to disclose greenhouse gas emissions and the business risks related to severe weather events and the transition to a smaller carbon footprint.

The rule would require reporting of so-called Scope 1 and Scope 2 emissions, which are tied to companies' direct and indirect emissions linked to operations and energy purchases, and in some cases Scope 3 emissions, if they are deemed meaningful to investors. Scope 3 emissions, the broadest category, includes emissions from the entire "value chain" of an organization, including suppliers and customers.

Companies will have to report the "actual or likely material impacts" climate risks will have on their business, strategy and expenditures, as well as metrics detailing for investors how a company arrived at those figures.

Federal Project Reviews

The White House Council on Environmental Quality in April finalized the first part of its effort to strengthen environmental reviews of infrastructure and other projects that need federal approval, broadening the scope of impacts that can be evaluated and clarifying that agencies are free to create even stricter rules.

The rule amending National Environmental Policy Act implementing regulations officially rolled back changes that were made in 2020 by the Trump administration to limit the scope of NEPA reviews.

Under the final rule, federal agencies must evaluate the direct, indirect and cumulative impacts — including climate change — of proposed projects, a departure from the 2020 rule that restricted what impacts agencies could consider.

The rule also restores flexibility to federal agencies to determine the "purpose and need" of a proposed project, which expands their ability to develop and consider alternative designs or approaches that may not "fully align with the stated goals of the project's sponsor, often a private company," according to the CEQ.

And the final rule establishes NEPA regulations as a floor, rather than a ceiling, for the environmental review standards that federal agencies should be meeting.

Power Plant Emissions

The EPA moved ahead with a few separate actions regarding power plant emissions, beginning in January with a proposal to reinstate an Obama-era legal finding — which had been struck down by the Trump administration — that underpinned mercury emissions standards for power plants.

The EPA said health benefits stemming from the 2012 mercury and air toxics standards rule outweighed compliance costs. The finding restores the Obama administration's conclusion that it was "appropriate and necessary" to regulate mercury emissions for coal- and oil-fired power plants under the Clean Air Act. That finding was a prerequisite for the actual regulations.

The agency continued its push in March with a proposal to formalize a ban on Clean Air Act legal defenses often deployed by facility operators when they've violated the act during emergencies.

The EPA is looking to complete a rulemaking process launched in 2016 that proposed a rule banning "affirmative defenses," which are part of CAA Title V implementing regulations. Title V requires major sources of air pollution to get operating permits and certify compliance at least annually.

And in April the EPA started laying the groundwork for new regulations on greenhouse gas emissions from natural gas-fueled power plants, telling states, tribes and energy industry players in a draft white paper that as the number of such plants increases, they need to think about increasing efficiency and incorporating renewables.

The agency outlined emissions control techniques that it said could reduce greenhouse gas emissions from new stationary combustion turbines and explained how regulations on the equipment could take shape under the Clean Air Act.

Vehicle Emissions

So far in 2022 the Biden administration has made big moves to control automotive greenhouse gas emissions. In March the EPA restored California's authority to set its own greenhouse gas emissions for cars and establish a zero-emissions vehicle program, reviving a Clean Air Act waiver that had been yanked by the Trump administration.

The EPA said the Trump administration wrongly revoked the waiver allowing the Golden State to set standards that are stricter than federal requirements and erroneously concluded that the CAA doesn't allow other states to adopt California's standards.

That same month the agency proposed strengthening emissions standards for heavy-duty vehicles and engines starting in 2027. The proposed Clean Trucks Plan would reduce nitrogen oxides, or NOx, emissions from heavy-duty gasoline and diesel engines and set updated greenhouse gas standards for school buses, transit buses, commercial delivery trucks and short-haul tractors.

And the U.S. Department of Transportation got into the act as well, finalizing fuel economy standards for cars that would boost average efficiency to 49 miles per gallon by 2026.

Under the new corporate average fuel economy, or CAFE, standards, automakers must increase fuel efficiency by 8% annually for model years 2024 and 2025 and 10% by the 2026 model year.

Chemical Regulations

The EPA has acted on a couple of different fronts to address the tough issues surrounding per- and polyfluoroalkyl substances, or PFAS, and the implementation of the Toxic Substances Control Act.

In January the agency sent the White House Office of Management and Budget a proposal to designate perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonic acid, or PFOS, as hazardous chemicals under the Comprehensive Environmental Response, Compensation and Liability Act.

While no details of the proposal have been made public, Stephanie Feingold, a partner at Morgan Lewis & Bockius LLP, said this would be the first designation of a chemical as a hazardous substance under CERCLA directly by rulemaking as opposed to through reference to another statutory framework such as the Resource Conservation and Recovery Act, the Clean Water Act or the Clean Air Act.

She said there are potentially wide-ranging impacts to a number of companies and industries, both for operating sites and historic sites currently undergoing cleanups.

"It could expand the scope and cost of investigations, it could possibly delay current investigations, it could result in potential reopener of sites that people thought were done and the remediation completed, and it will also trigger release reporting requirements under CERCLA and the Emergency Planning and Community Right-to-Know Act," Feingold said.

The agency recently set nonbinding drinking water health advisories for PFOA and PFOS, too, which could be relied upon later to set actual federal regulatory standards.

In May the EPA proposed a new rule that would impose a tough new reporting requirement on asbestos

manufacturers and processors. The proposed rule would require them to report certain use and exposure information, including information related to asbestos-containing articles under Section 8(a) of the TSCA.

And also in May, the agency proposed tightening its rules for processing confidential business information under the TSCA so that nonconfidential information isn't unnecessarily made secret. Under the EPA's proposed rule, the agency would gain more leeway to judge the validity and the scope of a company's CBI claim through new procedures such as a standard set of substantiation questions.

State and Tribal Water Authority

The EPA recently proposed strengthening states' and tribes' authority to block projects like pipelines, export terminals and dams over Clean Water Act concerns, saying the power had been improperly restricted by the Trump administration.

The proposed rule would expand states' and tribes' power to grant or deny water quality certificates under Section 401 of the Clean Water Act — a power that, when exercised, has upset project proponents.

Under the agency's new proposed rule, states and tribes would have expanded authority to assess whether the proposed activity "as a whole" will comply with water quality requirements, which include water quality-related state or tribal laws. In the 2020 version, states and tribes could only look at pollution discharges, not other factors such as changes to water quantity or flow characteristics.

Endangered Species

In June the U.S. Fish and Wildlife Service proposed a rule that would for the first time explicitly authorize the agency to reintroduce endangered or threatened species into suitable habitats that may be outside their historical domains.

The effects of climate change and invasive species are harming the ability of animals and plants protected under the Endangered Species Act to survive in their traditional areas, the FWS said. So the service wants to update its regulations implementing Section 10(j) of the act, which addresses how "experimental populations" of protected species may be located.

Brett Hartl, the Center for Biological Diversity's government affairs director, said the rule is good progress in a key area.

"It's important, it makes sense scientifically, it's good conservation practice, it's a recognition that habitats are going to shift, need to help species move, shift where they need to be," Hartl said. "Overall it's a good positive signal."

But he noted there are still several important ESA-related rules that are expected and have yet to materialize.

"I would characterize the first six months of this year as losing momentum and willpower. Instead of stepping on the accelerator to start moving more and more rules, they've slowed down," he said.

Environmental Justice

The U.S. Department of Justice in May announced a raft of environmental justice initiatives, including restoring prosecutors' authority to allow defendants to undertake special community projects as part of settlements that resolve apparent environmental violations.

The DOJ said that supplemental environmental projects were inappropriately declared off-limits by the Trump administration in 2017. The department issued an interim final rule that restored the right to use such projects in settlement agreements to compensate victims and remedy violations of federal environmental laws.

There were also important developments at the state level. The New Jersey Legislature in 2020 passed what's widely considered to be trend-setting legislation aimed at reducing harm in communities that find themselves in proximity to the state's many industrial centers. The draft regulations implementing the bill were just released in June.

Emily Lamond, a member at Cole Schotz PC, said attorneys have been anticipating the regulations because the law does give the state so much more authority to consider environmental justice in areas where it hasn't in the past.

"Now we're starting to see them deny permits based on environmental justice regulations," Lamond said. "It's a big deal, it really is."

--Additional reporting by Al Barbarino, Keith Goldberg and Clark Mindock. Editing by Orlando Lorenzo.